Sharayu Khot.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2065 OF 2017

Rama Industries Ltd. ...Petitioner

Versus

Deputy Commissioner of Income Tax & Ors. ...Respondents

ALONG WITH

WRIT PETITION NO. 2068 OF 2017

Rama Phosphates Ltd. ...Petitioner

Versus

Deputy Commissioner of Income Tax & Ors. ...Respondents

ALONG WITH

WRIT PETITION NO. 2075 OF 2017

Rama Petrochemicals Ltd. ...Petitioner

Versus

Deputy Commissioner of Income Tax & Ors. ...Respondents

Mr. Jehangir Mistri, Senior Advocate, a/w Mr. P.C. Tripathi i/by Mr. Atul Jasani, for the Petitioner in all the Petitions.

Mr. A.R. Malhotra, a/w Ms. Padma Divakar, for the Respondents in all the Petitions.

CORAM : M.S. SANKLECHA &
RIYAZ I. CHAGLA, JJ.

DATE : 19 January 2018

P.C. :

1. At the request of learned Counsel for the parties, these three Petitions arising out of a common order of the Income Tax Appellate Tribunal ("***the Tribunal***" for short), are being finally disposed of at the stage of admission.

2. These three Petitions under Article 226 of the Constitution of India, take exception to the common order dated 28 March 2016 passed under Section 254(1) of the Income Tax Act, 1961 ("***The Act***" for short) and common order dated 19 May 2017 passed under Section 254(2) of the Act relating to assessment year 2009-10. The impugned order dated 28 March 2016 passed in a regular Appeals under Section 254(1) of the

Act by the Tribunal while partly allowing the Appeals of the Revenue, restored the issue of the Assessing Officer to determine the nature (capital or revenue) of the loan waiver. The common impugned order dated 19 May 2017 dismissed the rectification application under Section 254(2) of the Act by the Petitioners seeking to rectify the common order dated 28 March 2016 passed under Section 254(1) of the Act.

3. At the very outset, the Respondent raised an objection to the Petition being entertained to the extent it challenges the order dated 28 March 2016 passed under Section 254(1) of the Act. This, on the ground of an efficacious alternate remedy of an Appeal under Section 260A of the Act being available and also on account of delay. In response, Mr. Mistri, learned Senior Counsel for the Petitioner, states that the challenge in this Petition is being restricted only to the order dated 19 May 2017 passed by the Tribunal under Section 254(2) of the Act, i.e. on the Petitioners' application for rectification. Thus, the Petitioners challenge to the order dated

28 March 2016, stands withdrawn.

4. The grievance of the Petitioners before us is that their rectification application ought to have been allowed. This as the common order 28 March 2016 partly allowing the Revenue's Appeal, placed reliance upon a Delhi High Court's decision in ***Logitronics P.Ltd. Vs. Commissioner of Income Tax***[1] without any of the parties citing it nor the Tribunal making reference to it during the hearing before it. This fact is even accepted by the Tribunal in its impugned order dated 19 May 2017. Therefore, according to the Petitioner, on the above ground, the rectification application be allowed, as the Tribunal was duty bound to put the case law it seeks to rely upon, to the parties before it and consider their submission on it, before taking a view of the dispute.

5. On the other hand, Mr. Malhotra, learned Counsel for the Revenue, places reliance upon the impugned order dated 19 May 2017 of the Tribunal, rejecting the rectification

1 ***333 ITR 386***

application. In the above impugned order, Tribunal accepted the fact that the decision of the Delhi High Court in ***Logitronics P.Ltd***. (supra) was not a decision which arose for consideration during the course of hearing of the Appeal leading to order dated 28 March 2016. However, it is submitted that the impugned order correctly holds that this reference to the above decision of the Delhi High Court, would make no difference, as the decision to restore the issue to the Assessing Officer to determine the purpose/object of the loan to consider the nature of waiver, had already been taken in the earlier part of the impugned order dated 28 March 2016. Thus, the reference to the decision of the Delhi High Court would not in any manner affect/impact the reasoning and the conclusion in the common order dated 28 March 2016. Therefore, it is submitted that the impugned order dated 19 May 2017 dismissing the rectification application, calls for no interfere.

6. In Rejoinder, Mr. Mistri, learned Senior Counsel for the Petitioner, disputes the above position. According to him,

the decision of Delhi High Court in ***Logitronics P.Ltd.*** (supra), from a bare reading of the order dated 28 March 2016, it has influenced the final decision.

7. In the above context, it would be appropriate to extract that portion of the order dated 28 March 2016 (which is also reproduced in the common impugned order dated 19 May 2017), as this is the bone of contention between the parties as under :-

> *"........ Considering the peculiar facts and circumstances of the case, we are of the opinion that the matter needs further verification. Therefore, in the interest of justice, matter is being restored back to the file of the Assessing Officer to decide the issue afresh after considering the loan sanctioning and the loan waiver documents. He is directed to afford a reasonable opportunity of hearing to the assessee.*
>
> *Here, we would like to refer to the case of Logitronics P.Ltd. (333 ITR 386), delivered by the High Court of Delhi. The facts of the case were that under a one-time settlement with the bank, the assessee discharged Rs. 1,85,00,000/- against the principal amount of loan of Rs. 4,76,92,213/- and the remaining sum of Rs. 1,90,42,295/- was waived, that the Assessing Officer taxed the*

principal amount of loan waived as income, that the FAA deleted the addition holding that the provisions of sections 2(24), 28(i), (iv) and 41(1) were not applicable and that the Assessing Officer was not justified in making the addition of Rs. 2,91,42,213/- being the principal amount of loan waived. The Tribunal reversed the order of the FAA. On further Appeal, the High Court held as under :-

> *"The Tribunal had found that nothing was brought on record to show that the loan taken by the assessee from the bank was utilised for the purpose of acquiring capital assets. On the contrary, the material on record indicated that the assessee had obtained the loan or credit facility by way of hypothecation of finished goods, semi-finished goods, raw material, book debts, receivable claims, securities and rights by way of first charge which indicated that the assessee had obtained the loan facility for its business activity or trading operations. On the question whether the whole amount of the loan had been utilised either for the purpose of acquiring a capital asset or for the purpose of business activity or trading activity the Tribunal remitted the matter to the Assessing Officer for fresh adjudication. The Tribunal had rightly called out the principle laid down from the various judgments and had given an opportunity to the assessee to prove its case before the Assessing Officer. Therefore, there was no reason or occasion for the assessee to feel aggrieved by the order of the Tribunal."*

Considering the above discussion, we decide the second ground of Appeal in favour of the Assessing Officer in part."

(emphasis supplied)

8. Tribunal after recording the above in the impugned order dated 19 May 2017, given its reason for not entertaining the rectification application, as under:-

> "In short the Tribunal had taken a decision of remanding back the matter to the file of the Assessing Officer on the basis of cases already referred to by FAA. As far as case of ***Logitronics P.Ltd.*** (supra) is concerned it has been mentioned as supporting the decision already taken. It is not deciding factor......"

9. Our Court in ***Inventure Growth And Securities Ltd. Vs. Income-Tax Appellate Tribunal & Ors***[2]. had occasion to deal with the similar fact situation viz. Tribunal passing an order by relying upon a decision, which was not a subject matter of consideration during the hearing of the Appeal and rectification application, was also disallowed by the Tribunal. In a Writ Petition filed, our Court has while allowing the Petition, held as under :-

> "It is in these circumstances that we are inclined to allow the miscellaneous application and to restore the appeal and the cross-objections for fresh

2 ***324 ITR 319***

consideration before the Tribunal. We clarify that it cannot be laid down as an inflexible proposition of law that an order of remand on a miscellaneous application under Section 254(2) would be warranted merely because the Tribunal has relied upon a judgment which was not cited by either party before it. In each case, it is for the Court to consider as to whether a prima facie or arguable distinction has been made and which should have been considered by the Tribunal. It is in this view of the matter that we had called upon counsel appearing on behalf of the assessee to at least prima facie indicate before this Court the grounds on which the decision in ***Khandwala Finance Limited*** was sought to be distinguished. If we were to be of the view that the decision in ***Khandwala Finance Limited*** was squarely attracted to the facts of the present case, we may not have been inclined to remand the proceedings. An order of remand cannot be an exercise in futility. However, for the reasons which were already indicated, we find prima facie that prejudice would be sustained by the petitioner by denying him an opportunity to deal with the distinguishing features in the case of ***Khandwala Finance Limited***."

(emphasis supplied)

10. We have considered rival submissions. From the extract of the order dated 19 May 2017 reproduced herein above, we note that having directed the restoration of the matter to the Assessing Officer, it goes on to extract certain observation of the Delhi High Court in ***Logitronics P.Ltd***. (supra) and only thereafter i.e. considering the above decision, decides ground No. 2 in the Appeal, was in favour of the Revenue. In the aforesaid facts, we cannot with certainty state that the decision in ***Logitronics P.Ltd***. (supra) had not even remotely influenced the decision taken. In this case, the manner in which the order dated 28 March 2016 is structured and in the final view/direction given after considering the decision of the Delhi High Court in ***Logitronics P.Ltd***. (supra), it does *prima facie* appear to us, have been influenced by it. Therefore, in the present case, Tribunal while dealing with the rectification application, must deal with the Petitioner's grievance that the Delhi High Court's decision in ***Logitronics P.Ltd***. (supra) does not apply to the present facts. We are satisfied that the above aspect has to be considered while

disposing of the rectification application in the present facts.

11. In the above view, we set aside the common impugned order of the Tribunal dated 19 May 2017 and restore each of the Petitioner's rectification application dated 6 September 2016 to the Tribunal for fresh consideration. This restoration is only to reconsider the Petitioner's grievance in respect of reference/reliance upon the Delhi High Court decision in ***Logitronics P.Ltd***. (supra) in the common impugned order dated 28 March 2016 and pass appropriate order on the rectification application.

12. All three Petitions disposed of in the above terms. No order as to costs.

[RIYAZ I. CHAGLA J.] **[M.S. SANKLECHA, J.]**